SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4264-14T3

NEW JERSEY DIVISION OF CHILD PROTECTION AND PERMANENCY,

Plaintiff-Respondent,

v.

S.W.,

Defendant-Appellant,

and

M.S. (Deceased) and D.C.,

Defendants.

IN THE MATTER OF K.S. and M.W., minors.

Submitted January 18, 2017 – Decided January 27, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FN-07-0184-14.

Joseph E. Krakora, Public Defender, attorney for appellant (Edward F. McGinty, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Roman Guzik, Deputy Attorney General, on the brief).

Joseph E. Krakora, Public Defender, Law Guardian, attorney for minors (Randi Mandelbaum, Designated Counsel, on the brief).

PER CURIAM

S.W. appeals from a December 9, 2013 Family Part order finding she abused or neglected her seven-year-old and one-year-old children pursuant to N.J.S.A. 9:6-8.21(c) by failing to adequately supervise them and subjecting them to deplorable living conditions. We affirm.

S.W. is the biological mother of K.S., born on August 1, 2006, and M.W., born on April 15, 2012.[1] In December 2013, the court conducted a fact-finding hearing and found that S.W. abused or neglected K.S. and M.W. We discern the facts from the record on appeal.

On July 18, 2013, the Irvington N.J. police department contacted the Division of Child Protection and Permanency (the Division) to report that K.S., then six-years-old, and M.W., then one-year-old, were left home alone by their mother, S.W. The

[1] Neither father is a party to this appeal; K.S.'s father (M.S.) is deceased and M.W.'s father (D.C.) was incarcerated during the relevant period. On February 3, 2016, the court terminated D.C.'s parental rights by default.

police officer reported that he was on patrol in the neighborhood when a woman stopped him saying that K.S. and M.W. had come to her apartment to tell her that they had no adult supervision.

K.S. told the officer that S.W. had left them approximately two hours earlier with the upstairs neighbor, J.M. K.S. stated that after an hour, J.M. handed K.S. her one-year-old brother M.W. and left. The officer noted that J.M., who had come back home, appeared heavily intoxicated. Someone called S.W. and she came home, telling the officer she had only been gone for three minutes. The officer brought S.W. and the children to the police station.

The Division workers went to the police station, obtained the necessary information from the officer, and drove S.W. and her children home. The Division workers observed that J.M. appeared intoxicated and smelled of alcohol. While the workers talked to J.M., S.W. left through the back door with a bag and her children. The police searched the area for S.W. and a neighbor was able to convince S.W. to return. S.W. stated that she left to avoid the Division.

On July 23, 2013, the Division interviewed K.S. and learned that she is left alone when S.W. goes to the store. S.W. told the Division that her grandmother owned the apartment she lived in but it was her responsibility to make repairs.

On July 24, 2013, S.W. signed a family agreement with the Division, agreeing to provide the Division with proof of income, clean her apartment, remove paint chips from the walls and ceiling, and follow up with welfare regarding her benefits and temporary rental assistance. S.W. provided the Division with a rental agreement from her grandmother stating S.W. would pay $1300 per month to remain in the apartment. On July 25, 2013, S.W. told the Division that she could not pay that amount. On August 1, 2013, S.W.'s grandmother learned the Division would not pay the rent for S.W. and told the Division she would reconsider the price.

On August 7, 2013, the Division visited S.W. in her home and found that she was not in compliance with the family agreement. There was garbage throughout the apartment and paint chips peeling off the walls and ceiling. There was no hot water in the home and the Division worker was concerned about the lack of food. On August 14, 2013, the Division decided to request care and supervision of K.S. and M.W. because the Division had made numerous attempts to contact S.W., S.W. failed to stabilize her housing, and S.W. did not remove the paint chips in the apartment. On August 21, 2013, the Division was awarded care and supervision of K.S. and M.W. S.W. did not appear at the hearing.

On September 10, 2013, the Division contacted the board of education and found out that K.S. had not attended school yet that

academic year. On September 12, 2013, at approximately 1:15 p.m., the Division performed a random check at S.W.'s apartment. The two Division workers found seven-year-old K.S. home alone in the apartment. When they knocked on the door, K.S. came to the window but would not let them in. The workers identified themselves to a man who arrived at the address at the same time as them. The man went into the apartment through the back door and let the workers inside.

The Division workers described the apartment as "deplorable." K.S. did not have on clean clothes, she appeared "unkempt," "her hair was not groomed," and she had bumps on her skin and an "unpleasant smell." The apartment had garbage on the floors, spoiled food on the stove top, and a soiled diaper in the sink. There was little to no furniture and it appeared that the family was sleeping on a partially inflated air mattress.

When the worker asked K.S. who was supervising her, she said "no one." K.S. said S.W. took M.W. with her in a car to the store and that she did not go with them because there was no room for her in the car. When the worker asked how long she had been home alone she said "a while" and when asked what she was doing, K.S. said she was watching the Smurfs movie and it came off and back on three times. The movie is an hour and forty-three minutes long. K.S. said she was not scared to be home alone because she

was home alone often. When asked why she was not in school, K.S. said she does not go to school. K.S. indicated that she ate "something small" in the morning and was hungry.

At 1:50 p.m., the Division workers called the caseworker supervisor who instructed them to remove K.S. from the home. The workers removed K.S. and thanked the man who opened the door for them on their way out. The workers took K.S. to get McDonald's, and on their way, S.W. called the workers and said that she left K.S. with a man named Ed. Ed was later identified as the man who arrived at the same time as the workers and let them into S.W.'s apartment. K.S. said that no man named Ed was watching her. The workers instructed S.W. to meet them at the Division office.

At 3:00 p.m., the Division interviewed S.W. who said she left K.S. with Ed. She identified Ed as a paternal relative, but could not provide his full name. When workers called Ed, he refused to meet them and stated he did not want to return to jail. S.W. claimed she was gone for only ten minutes, even though the workers were with K.S. in the apartment for at least thirty minutes. S.W. told the workers that M.W. was at his paternal grandfather's house, however, when workers went to retrieve him, he was not there. S.W. did not produce M.W. until an emergent hearing the next day.

S.W. did not appear at the fact-finding hearing, but was represented by counsel. One Division worker testified that S.W.

was involved with the Division for many years and that the Division previously had custody of K.S. from 2008 to 2010. Based on the evidence presented by the Division, the court found that the Division met its burden to prove abuse or neglect by a preponderance of the evidence. The judge stated:

> I've heard the testimony, I've reviewed the exhibits and this appears to be reasonably clear cut. I do find that the Division has proven it[s] case of abuse and neglect under the statute . . . [b]y a preponderance of the evidence . . . . [T]here's really no testimony to dispute what the Division found and saw in the home. [T]hey were there for a substantial period of time. It appears that the child was there for a substantial period of time before that . . . . The excuses that [S.W.] gave were just that, alibis, excuses . . . . [I]t's the second time that this has occurred.
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> It seems clear that she never complied with any of the things in the [] case plan that [] she agreed to. The [] apartment from the photographs looks appalling . . . . [C]ertainly this is not a home that you would want a child in. And certainly not a [seven-year-old] left alone for substantial hours of time in that home in that condition certainly makes absolutely no sense, she should have been in school, she's not cared for.

In the order, the judge noted that S.W. "failed to follow the terms of the family agreement that she had signed with the Division in July 2013 thereby placing her two minor child[ren] at substantial and imminent risk of harm." On May 20, 2015, S.W.

filed a notice of appeal from the December 9, 2013 fact-finding order.

On appeal, S.W. argues:

> I. THE TRIAL COURT ERRED IN FINDING THAT THE DIVISION PROVED BY A PREPONDERENCE OF THE EVIDENCE THAT THE MOTHER LEFT THE CHILD UNSUPERVISED.
>
> > A. The Division Failed to Prove that the Mother Did Not Delegate Supervision to Ed and Failed to Prove that Ed was Grossly Negligent in Supervising the Child.
> >
> > B. The Trial Court Must Be Reversed Because It Erred By Filling In The Division's Missing Evidence And Its Finding Of Abuse And Neglect Was Based On Speculation.

This court's standard of review is limited. In re J.N.H., 172 N.J. 440, 472 (2002). Because a trial judge's findings "are considered binding on appeal when supported by adequate, substantial and credible evidence[,]" this court only disturbs factual findings when "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Inv'rs Ins. Co. of Am., 65 N.J. 474, 484 (1974) (citations omitted); see also N.J. Div. of Youth & Family Servs. v. G.L., 191 N.J. 596, 605 (2007). However, "[a] trial court's interpretation of the law and the legal consequences that flow

from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Where the Division seeks care and supervision of a child pursuant to Title 9 under the belief the child has been neglected or abused, the court conducts an evidentiary hearing where the Division must prove by a preponderance of the evidence that "the child is an abused or neglected child . . . ." N.J. Div. of Youth & Family Servs. v. J.Y., 352 N.J. Super. 245, 262 (App. Div. 2002) (quoting N.J.S.A. 9:6-8.44); see also N.J.S.A. 9:6-8.21(c); N.J.S.A. 9:6-8.46(b). An "[a]bused or neglected child" includes

> a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his [or her] parent or guardian . . . to exercise a minimum degree of care (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court[.]
>
> [N.J.S.A. 9:6-8.21(c)(4).]

The New Jersey Supreme Court has explained that, when evaluating whether a parent has failed to exercise a "minimum

degree of care," courts are to use a gross negligence standard. G.S. v. Dep't of Human Servs., 157 N.J. 161, 178 (1999) (referring to conduct that is "grossly or wantonly negligent, but not necessarily intentional"). In construing this provision, this court has emphasized that the primary concern of Title 9 is the protection of children, not the culpability of parental conduct. State v. Demarest, 252 N.J. Super. 323, 330 (App. Div. 1991). "[A] guardian fails to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." G.S., supra, 157 N.J. at 181.

An essential element in the definition of abuse or neglect is the "probability of present or future harm" to the child. N.J. Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 24 (App. Div. 2004), certif. denied, 182 N.J. 426 (2005). "[H]arm cannot be presumed in the absence of evidence of its existence or potential." Id. at 28. However, "[i]n the absence of actual harm, a finding of abuse and neglect can be based on proof of imminent danger and substantial risk of harm." N.J. Dep't of Children & Families v. A.L., 213 N.J. 1, 23 (2013). The analysis of such allegations of child abuse which do not result in actual harm is fact-sensitive and resolved on a case-by-case basis. Dep't of Children & Families, Div. of Child Prot. & Permanency v. E.D.-

O., 223 N.J. 166, 192 (2015).

There exists sufficient credible evidence in the record to support the judge's finding of abuse or neglect. When the Division workers found K.S. alone for a second time, she was unkempt, ungroomed, and hungry. She had watched a 103-minute video three times, indicating she was alone for five to six hours. K.S. was surrounded by garbage, spoiled food, and a soiled diaper in the kitchen sink. There was no hot water in the apartment. She indicated to Division workers that her mother had left her alone many times before, and that is why she was not scared. Furthermore, she was seven-years-old at the time and should have been in school.

The judge found that S.W.'s claim that she left K.S. with Ed was not credible. S.W. now argues that the Division did not prove by a preponderance of the evidence that she did not delegate supervision of K.S. to Ed. S.W. tries to argue that she was no longer a "parent or guardian" under Title 9 because she had Ed "assume[] responsibility for the care, custody, or control" of K.S. N.J.S.A. 9:6-8.21(a). S.W.'s argument that Ed became the "parent" under Title 9 and she no longer fit the definition is without merit. S.W. did not even know Ed's full name even though she claimed he was a relative, Ed arrived at the apartment at the same time as the Division workers, Ed actually helped Division

workers gain access to the apartment to take K.S., and Ed refused to talk to the Division for fear of being sent back to jail.

The judge also found that S.W. exposed her children to imminent danger and substantial risk of harm. See In re Guardianship of D.M.H., 161 N.J. 365, 383 (1999) (explaining a court "need not wait to act until a child is actually irreparably impaired by parental inattention or neglect"). By not adhering to the family agreement, S.W. let her children live in deplorable conditions. There was garbage on the floors and paint chips peeling from the walls and the ceiling. She put soiled diapers in their kitchen sink. Also, S.W. had not received a lease or feasible rental agreement from her grandmother/landlord, so she and the children could have been removed from the apartment at any time.

S.W. cites two cases in her brief to support her position. These comparisons are misplaced. In the first case, New Jersey Division of Child Protection & Permanency v. J.C., 440 N.J. Super. 568, 579 (App. Div. 2015), the defendant drank alcohol and slept late, leaving her young child wearing a dirty diaper in the next room with the apartment door ajar. This court reversed the trial court's finding of abuse or neglect stating that there was no evidence challenging the defendant's explanation that a friend visiting left the door ajar and we were reluctant to find defendant

abused her child by drinking and sleeping in late on one occasion, leaving her child in a dirty diaper. Ibid.

In New Jersey Department of Youth & Family Services v. J.L., 410 N.J. Super. 159, 168 (App. Div. 2009), the defendant allowed her four-year-old and six-year-old children to walk home without her. The children stayed within her line of view all the way home. When they got home, the door shut and locked on them and the older child called 911. Id. at 162. The children were unsupervised for approximately thirty minutes. Id. at 166. This court found that the defendant J.L.'s conduct towards the children was appropriate with the exception of this one incident and found that her conduct did not rise to the level of gross negligence. Id. at 168.

In this case, S.W. was not in the apartment as the mother was in J.C. J.C., supra, 440 N.J. Super. at 579. Also, it was not a one-time incident as in J.L. J.L., supra, 410 N.J. Super. at 168. Here, S.W. left her children with improper supervision once already. The Division tried to work with her and she refused to comply with the family agreement she signed. The Division had previously taken K.S. in 2008. When the Division workers could not contact S.W., they came to the apartment to find seven-year-old K.S. not in school and alone for a substantial period of time

in deplorable conditions. The situation does not compare to the two cases cited by S.W.

Affirmed.